Filed 12/11/20 Internat. Union of Operating etc. v. City and County of San Francisco CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

INTERNATIONAL UNION OF OPERATING ENGINEERS, STATIONARY ENGINEERS, LOCAL 39, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.	A158004 (San Francisco City and County Super. Ct. No. CPF-18-516365)

The International Union of Operating Engineers, Stationary Engineers, Local 39 ("Union") appeals from the trial court's denial of its petition to compel arbitration in a dispute concerning the termination of Jason Fong by his employer, the City and County of San Francisco ("City"). The trial court concluded that under the Memorandum of Understanding ("Memorandum") between the Union and the City, Fong's termination was not subject to arbitration because he was neither a permanent employee nor an employee who had successfully completed a probationary period. Because we conclude that the Union's contentions lack merit, we affirm the judgment.

BACKGROUND

1.

During the relevant timeframe, the Union and the City were parties to the Memorandum, which controls whether the instant dispute is subject to arbitration. Article I.G. ¶44 of the Memorandum provides that "[p]ermanent employees or employees who have satisfactorily completed the probationary period" may arbitrate grievances concerning discharge or discipline.

The City and County of San Francisco Charter ("Charter") and Civil Service Commission Rules ("Civil Service Rules") govern the appointment of the City's permanent civil service employees, as well as other employees.[1] (S.F. Charter, §10.101; S.F. CSC Rules, rule 101.) Permanent employees are selected from an eligible list (S.F. CSC Rules, rule 102, § 102.1.1; *id.* rule 114, § 114.2) after passing a competitive examination (S.F. CSC Rules, rule 102, § 102.17; *id.* rule 112, § 112.1; *id.* rule 114, § 114.25; S.F. Charter, § 10.104), and they are entitled to civil service protections after completing a probationary period. (S.F. CSC Rules, rule 117, § 117.1.1; *id.* rule 122, § 122.7.1.) For candidates appointed to a permanent position, the probationary period is "[t]he final and most important phase of the selection process and is to be used for evaluating the performance of [the] employee." (S.F. CSC Rules, rule 117, §§ 117.1.1, 117.2.1.) While a candidate serving a probationary period may be dismissed without cause (S.F. CSC Rules,

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[1] We take judicial notice of the Charter provisions and Civil Service Rules relied upon by the parties. (See Evid. Code, §§ 451, subd. (a), 452, subd. (b); see also *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1194.)

rule 117, § 117.9.1), a permanent employee may be terminated only for cause with specified procedural protections. (S.F. CSC Rules, rule 122, § 122.7.1.)

In contrast, "exempt employees" are hired without undergoing the competitive examination and selection process, and they do not enjoy civil service protections. Rule 114, section 114.25, of the Civil Service Rules summarizes the difference between permanent employees and exempt employees:

> All permanent employees of the City and County shall be appointed through the civil service process by competitive examination unless exempted from the civil service examination and selection process in accordance with Charter provisions. Appointments excluded by Charter from the competitive civil service examination and selection process shall be known as exempt appointments. Any person occupying a position under exempt appointment shall not be subject to civil service selection, appointment, and removal procedures and shall serve at the pleasure of the appointing officer.

Accordingly, exempt employees may be dismissed without cause. (S.F. CSC Rules, rule 114, § 114.25; see also S.F. Charter, § 10.104.)

2.

The City hired Fong as an Apprentice Stationary Engineer, Water Treatment Plant. Fong was not appointed from an eligible list. When he began his employment, Fong signed a "Notice to Exempt Appointee" indicating that he was "an exempt appointee" hired for a three-year term. The notice stated: "As an exempt appointee you acquire no guaranteed right or preference for permanent Civil Service employment." The notice also stated that "exempt employees serve at the pleasure of the Appointing Officer" and "your employment may be

terminated at any time by the Appointing Officer with or without cause."

A few months later, Fong and his supervisor signed a California Department of Industrial Relations Division of Apprenticeship Standards Apprenticeship Agreement stating that the term of the apprenticeship was four years.

Less than 18 months after Fong was hired, the City terminated his employment. The Union filed a grievance alleging that the City violated the Memorandum by terminating Fong without cause and requested arbitration of the matter. After the City declined the request for arbitration, the Union filed its petition to compel arbitration.

DISCUSSION

The Union asserts that the trial court erred in holding that Fong's termination was not subject to arbitration under the Memorandum's authorization of arbitration for "[p]ermanent employees or employees who have satisfactorily completed the probationary period." On our independent review, we affirm the trial court's judgment. (See *Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1051 [applicability of arbitration agreement subject to de novo review where facts are undisputed]; *Kreutzer v. City and County of San Francisco* (2008) 166 Cal.App.4th 306, 313 (*Kreutzer*) [application of civil service rules to undisputed facts is reviewed de novo].)

The Memorandum makes clear that it must be interpreted consistently with the Charter and Civil Service Rules. Article VI.A. ¶283 of the Memorandum provides that "unless specifically addressed herein, those terms and conditions of employment which are currently set forth in the Civil Service Rules shall continue to apply to employees

covered by this contract." Similarly, Article I.B. ¶7 provides that "it is the intent of the Mayor . . . to agree to . . . terms and conditions of employment as are within the Mayor's jurisdiction, powers, and authority to act as defined by the Charter, state law, California Constitution and other applicable bodies of the law."

Under the Civil Service Rules, Fong was not a permanent employee because his appointment was not based on the civil service examination and selection process. (S.F. CSC Rules, rule 102, §§ 102.1.1, 102.17; *id.* rule 114, §§ 114.2, 114.25.) The Union does not dispute that Fong did not undergo the competitive selection procedures prerequisite to a permanent appointment, but argues he was nonetheless a permanent employee because his appointment did not comply with the requirements applicable to exempt positions. The Union asserts that Fong was appointed pursuant to section 10.104.18 of the Charter, which permits an exemption from the civil service selection process for appointments of three years or less for special projects or professional services with limited term funding. According to the Union, Fong's appointment was not for a special project or applicable professional service, and Fong and his supervisor signed an Apprenticeship Agreement for a four-year term.

However, assuming Fong's appointment failed to comply with the requirements for an exempt position, that does not render him a permanent employee. His appointment indisputably failed to comply with the requirements for permanent employees. (See S.F. CSC Rules, rule 114, §§ 114.25 ["All permanent employees of the City and County shall be appointed through the civil service process by competitive examination"], 114.2 ["A permanent appointment is an appointment

made as a result of certification from an eligible list to a permanent position"]; *id.* rule 102, § 102.1.1 [defining "Permanent Civil Service" appointment to mean "[a]n appointment made as a result of a certification from an eligible list to a permanent position or to a position declared permanent"].)

In addition, to the extent Fong's position was misclassified or his appointment was noncompliant, the remedy "is an application to the [Civil Service] Commission for reclassification of the position, not a post hoc decision by a court to grant civil service protection to an exempt employee who did not go through the civil service hiring process before being appointed to the position." (*Kreutzer*, *supra*, 166 Cal.App.4th at p. 316.)

We likewise reject the Union's assertion that Fong was an employee who had successfully completed a probationary period because the length of his employment exceeded the number of hours required for probationary employees. As Article II.C. ¶83 of the Memorandum makes explicit, "[t]he probationary period . . . [is] defined and administered by the Civil Service Commission." Rule 102, section 102.1.2, of the Civil Service Rules defines "[p]robationary" to mean the "[s]tatus of civil service employees during a trial period following permanent appointment." Rule 117 of the Civil Service Commission Rules, which defines and establishes the requirements for probationary periods, applies only to employees "who started work in a permanent civil service status." (See also S.F. CSC Rules, rule 117, § 117.3 ["A probationary period is required for . . . permanent appointments"].) Fong's appointment was not a permanent one, so the Memorandum's

reference to "employees who have satisfactorily completed the probationary period" is inapplicable to him.

The Union also relies on the fact that the Memorandum lists as a covered category of employees Fong's position of Apprentice Stationary Engineer, Water Treatment Plant. While that is true, it does not establish that every provision of the Memorandum is equally applicable to employees in Fong's position. The Memorandum addresses a variety of issues, some of which apply to employees in Fong's position and some of which do not. For example, Article IV.C. ¶252 of the Memorandum addresses breaks for "[a]ll employees covered by the provisions of this [Memorandum]"; article III.S ¶225 addresses long term disability for "employees with six months continuous service"; and article III.T ¶226 addresses salary steps for "[a]n employee who is a permanent appointee following completion of the probationary period or six months of permanent service." And while the Memorandum expressly limits the arbitration of disciplinary or discharge grievances to "permanent employees or employees who have satisfactorily completed the probationary period," no such restriction appears in the Memorandum's provisions (Article I.G. ¶33 to Article I.G. ¶43) authorizing arbitration of non-disciplinary grievances.

Contrary to the Union's assertions, the exclusion of employees in Fong's position from the arbitration provision governing disciplinary and discharge grievances is in keeping with the civil service system. For permanent employees, disciplinary action could ultimately lead to dismissal for cause, and arbitration of both discipline and discharge allows permanent employees to enforce their rights under the civil service system. (See S.F. CSC Rules, rule 122, § 122.7.1.) In contrast,

because employees exempted from the civil service examination and selection process may be dismissed without cause, regardless of whether they have a disciplinary history, there is no substantive right that would provide a basis for arbitrating their termination from employment. (See S.F. CSC Rules, rule 114, § 114.25.)

In short, City never agreed to arbitrate this dispute. (See *Olabi v. Neutron Holdings Inc.* (2020) 50 Cal.App.5th 1017, 1021-1022.) Accordingly, we conclude the trial court correctly denied the Union's petition to compel arbitration.

DISPOSITION

The judgment is affirmed.

Burns, P. J.

WE CONCUR:

Simons, Acting PJ.

Reardon, J.*

(A158004)

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.